No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in this class and collective action for wage-and-hour violations arising out of an employer's failure properly to compensate employees for time spent donning and doffing protective equipment and walking between sites where work was performed, the district court abused its discretion in granting certification where plaintiffs proceeded to prove the amount of work they did using individual timesheet evidence and representative proof concerning donning, doffing, and walking times in accordance with *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

2. Whether a class or collective action may be certified when it contains members who may not have been injured.

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INTRODUCTION

Federal and state wage-and-hour laws require employers to keep accurate records of employees' actual work-hours and pay time-and-a-half for overtime work. For decades, petitioner Tyson Foods has resisted compliance with both requirements. This case involves one Tyson plant at which plant-wide policies deprived workers of overtime compensation for donning and doffing protective and sanitation gear necessary for their jobs, walking between the locker room and the production floor, and related activities. Tyson did not keep records of its employees' hours worked, in violation of the Fair Labor Standards Act of 1938 ("FLSA"), Iowa wage-and-hour law, and a 1996 federal court injunction requiring records of these activities to be kept at the specific plant at issue.

Had Tyson kept the records, the class-certification question in this case would be easy. Four of five issues tried to the jury were common: (1) whether the activities were "work," (2) whether they were exempt under the Portal-to-Portal Act of 1947, (3) whether they were compensable when performed during the workers' meal break, and (4) whether they were de minimis. Respondents answered those four questions using proof common to the class. Within each of the two departments at issue, all employees used the same sanitation gear and standard protective gear and walked to and from the same production line on unpaid time as a matter of company policy. For the fifth issue (the amount of time worked), adding up workers' time would have been simple arithmetic had records existed. But because Tyson violated the law, respondents

employed inferential proof, including the time study central to Tyson's objection to certification.

This Court addressed that scenario in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that an employer cannot hide behind its own recordkeeping violations to defeat enforcement of overtime requirements by arguing plaintiffs have not proved the precise amount of time worked. When an employer fails to keep required records, employees may prove their case by inference. That evidentiary standard avoids rewarding lawbreakers like Tyson.

Under this Court's decisions, Rule 23 predominance must be assessed in light of the substantive law governing plaintiffs' claims. Given *Mt. Clemens*, the four common compensability issues predominated because the issue of how much time each worker worked could be shown by classwide, inferential proof. Respondents' reliance on such evidence—including a time study similar to one Tyson itself used to determine compensation for employees—comports with Rule 23's requirements.

On the second question—whether the presence of class members without damages defeats certification—Tyson now concedes a class may be certified although some members ultimately cannot prove injury. Tyson argues a court may not award damages to class members not entitled to them. That truism is inapplicable here: the district court did not award damages to uninjured individuals.

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Congress recognized that national action was required to combat sweatshop conditions, and accordingly enacted the FLSA "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). To accomplish these objectives, the FLSA established federal minimum-wage and maximum-hour standards, *see* 29 U.S.C. §§ 206, 207, and requires overtime compensation for hours in excess of 40 in a workweek "at a rate not less than one and one-half times the [employee's] regular rate," *id.* § 207(a)(1).

The FLSA requires employers to keep accurate, detailed records of the hours worked by each employee. *See id.* § 211(c) ("[e]very employer shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him" as prescribed by the Secretary of Labor). Neither averaging nor estimating time worked satisfies an employer's statutory obligation. *See, e.g., Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128 (3d Cir. 1984); T. Michael Kerr, Adm'r, Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, Fair Labor Standards Act, 2001 WL 58864, at *2 (Jan. 15, 2001).

Congress enacted this recordkeeping requirement "to aid in the enforcement of the Act." *Nat'l League*

of Cities v. Usery, 426 U.S. 833, 836 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). "The obligation [to pay wages under the FLSA] is the employer's and it is absolute The employer at its peril had to keep track of the amount of overtime worked by those of its employees in fact within the [FLSA]." *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959) (Friendly, J.) (internal quotations and alteration omitted).

Accordingly, in *Mt. Clemens*, this Court held that, when employers violate their statutory recordkeeping duty, employees are relieved of the burden to prove precisely how many hours they worked. Rather, the employee need only "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. Such inferential proof shifts the burden to the employer to prove the "precise amount of work performed" or "to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88.

2. Cases such as this one for failure to pay overtime for time spent donning and doffing gear before and after work and during meal breaks and walking to and from the production line implicate four classwide issues under the FLSA.

First, the FLSA covers only "work," which includes any "exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (internal quotations omitted).

Second, in the Portal-to-Portal Act, Congress exempted from the FLSA's scope "walking to and from the actual place of performance of the [employee's] principal activity" and "activities which are preliminary to or postliminary to said principal activity." 29 U.S.C. § 254(a). However, that provision does not exempt "performance of the principal activity," which "embraces all activities which are an 'integral and indispensable part of the principal activities.'" *Alvarez*, 546 U.S. at 29-30 (quoting *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956)). Donning and doffing protective clothing and equipment may be "integral and indispensable" and therefore compensable. *Id.* at 32; *Steiner*, 350 U.S. at 248-49.

Additionally, all work performed during a continuous workday is compensable notwithstanding the Portal-to-Portal Act, so "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [the Portal-to-Portal Act], and as a result is covered by the FLSA." *Alvarez*, 546 U.S. at 37.

Third, an employee's meal break is not compensable if the break is "bona fide" and not predominantly for the employer's benefit. *See Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259, 264 (5th Cir. 1998); *Roy v. County of Lexington*, 141 F.3d 533, 545-46 (4th Cir. 1998); *Henson v. Pulaski Cnty. Sheriff Dep't*, 6 F.3d 531, 533-34 (8th Cir. 1993).

Fourth, a "de minimis rule" excludes "negligible" time from "compensable working time" under the FLSA. *Mt. Clemens*, 328 U.S. at 692. This exception

applies only to amounts of time so small they are not "practically ascertainable." 29 C.F.R. § 785.47.

3. The FLSA imposes fines and imprisonment for certain violations of the FLSA's wage-and-hour provisions and its recordkeeping requirements. 29 U.S.C. § 216(a). It further creates a private cause of action for unpaid minimum wages or overtime and grants additional liquidated damages and attorneys' fees. *Id.* § 216(b). The FLSA authorizes employees to bring "collective" damages actions for themselves "and other employees similarly situated." *Id.* Unlike in a Rule 23 class action, a plaintiff must "opt in" to an FLSA collective action. *See id.*

Many States have complementary wage-and-hour laws paralleling the FLSA, including the Iowa Wage Payment Collection Law ("IWPCL"), Iowa Code § 91A.1 *et seq.* The IWPCL requires employers to pay for all time worked, *see Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873, 879 (N.D. Iowa 2007), and to pay overtime wages, *see Stahl v. Big Lots Stores, Inc.*, 2007 WL 3376707, at *4 (N.D. Iowa 2007). Like federal law, Iowa law requires recordkeeping, Iowa Admin. Code 875-216.2(1)(g), and creates a private cause of action, Iowa Code § 91A.8.

B. Factual Background

1. Petitioner Tyson Foods operates numerous meat-processing facilities, including the Storm Lake, Iowa facility at issue. Employees on Tyson's fast-moving production lines work in a physically demanding and dangerous work environment that requires wielding industrial slaughtering and butchering machinery in a high-pressure setting. The hours worked are long. Each shift exceeds eight

hours, and full-time employees typically work six days a week. JA122, 181-82, 326, 437.

For three decades, Tyson and IBP (Tyson's predecessor) repeatedly have been found liable for violating the FLSA, "reflecting what can only be described as a deeply-entrenched resistance to changing their compensation practices to comply with [its] requirements." *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 794 (M.D. Tenn. 2008).[1] Tyson's repeated violations stem from its longstanding "gang-time" compensation system, under which it paid employees only for time they are at work stations and the production line is moving. Tyson neither recorded nor paid employees for time spent on other necessary activities, including donning and doffing gear and walking between the production line and locker rooms.

In 1988, the Department of Labor ("DOL") charged that Tyson's gang-time system violated the FLSA's overtime and recordkeeping requirements. *See Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1318 (D. Kan. 1993), *aff'd and remanded*, 38 F.3d 1123 (10th Cir. 1994). A district court found that IBP's "company-wide practice is not to record or compensate employees for the time involved in performing the pre-shift and post-shift activities

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[1] *See also, e.g., Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *Jordan v. IBP, Inc.*, 2004 WL 5621927 (M.D. Tenn. 2004); *Chavez v. IBP, Inc.*, 2005 WL 6304840 (E.D. Wash. 2005); *Solis v. Tyson Foods, Inc.*, No. 2:02-CV-1174-VEH, Dkt. 523 (N.D. Ala. June 4, 2010); *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273 (D. Kan. 2012), *aff'd*, 770 F.3d 1300 (10th Cir. 2014); *Guyton v. Tyson Foods, Inc.*, No. 3:07-cv-00088-JAJ, Dkt. 257 (S.D. Iowa Apr. 3, 2012).

which [the court] determined to be compensable," including donning and doffing protective gear. *Reich v. IBP, Inc.*, 1996 WL 445072, at *1 (D. Kan. 1996), *aff'd*, 127 F.3d 959 (10th Cir. 1997). The court issued an injunction, which remains in effect and specifically names the Storm Lake facility, requiring Tyson to comply with the FLSA's overtime and recordkeeping requirements with respect to "pre-shift and post-shift activities found to be compensable under the [FLSA]." Injunction, *Reich v. IBP, Inc.*, No. 2:88-cv-02171, Dkt. 238 (D. Kan. July 30, 1996).

In 1998, after DOL again filed suit in response to IBP's continued refusal to comply with the *Reich* injunction, petitioner unilaterally instituted the "K-Code" policy at issue in this case. *See Acosta v. Tyson Foods, Inc.*, 2013 WL 7849473, at *10, *19 (D. Neb. 2013), *rev'd on other grounds*, 2015 WL 5023643 (8th Cir. 2015). Under this policy, Tyson still failed to record the actual time employees spent donning and doffing protective gear. Instead, Tyson estimated based on a 1998 time study the average time needed to perform some (but not all) donning and doffing activities, and allocated four minutes on each employee's timesheet to those activities. *Id.* at *14; *see* JA121-22; *see also infra* pp. 16-17 (describing Tyson's time study). As DOL later explained, the K-Code policy did not satisfy the FLSA, which requires an employer to "record and pay for each employee's *actual* hours of work." Opinion Letter, 2001 WL 58864, at *2 (rejecting "meatpacking companies[']" suggestion "to pay employees[] wages based on an average amount of time that all employees work").

2. Tyson requires workers to wear sanitation and protective gear that they must don in company locker rooms before reporting to the production line for their shifts. All workers must wear the same basic sanitation gear: rubber gloves, aprons, sleeves, cotton gloves, a hairnet, and a beardnet if needed. JA119, 150, 176-78, 233. All workers must also wear sanitation apparel that is uniform for each department: all Processing workers must wear a frock, and all Slaughter workers must wear light-colored shirts and pants ("whites"). *Id.* Tyson also requires all employees on the production lines to wear personal protective gear ("PPE"). All employees who work on the Slaughter and Processing floors at the Storm Lake facility must wear the same "standard" PPE: a hard hat, earplugs or ear muffs, and boots. JA119, 249-50. There are thus no variations in the sanitation gear for employees in the same department, and no variations among respondents' standard PPE throughout the plant.

Tyson further requires respondents to wear "knife-safety" PPE. Knife-safety PPE is also largely uniform; any variations are "small" and "limited." App. 99a, 101a. "[M]ost all" employees wield a knife on the production line. App. 99a (district court finding); *see* App. 101a; JA210 (trial testimony that at least 70% wield a knife). Knife-wielding employees wear a combination of the following equipment: (1) a shield for their abdomen (either a "plastic belly guard" or a "mesh apron"); (2) protective gloves and sleeves for their hands and arms (some combination of a "mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, [or] membrane skinner gloves"); and (3) equipment to maintain and secure their knives (for example, a scabbard). JA118.

In addition to donning and doffing Tyson's required gear, all workers must retrieve it from the Tyson locker room before each shift, JA119, 147-50, including sorting out any gear Tyson laundered overnight, JA155, 230. All workers must walk to the production line carrying or wearing their required gear. JA120, 147-50, 152, 172-73. After the shift ends, all workers must carry their required gear back to the locker room for storage or cleaning. JA153-56, 179-81, 228-29.

"[T]he factual variations between employees paid via gang time are limited," as the district court found. App. 101a. All employees "wear some sort of PPE, and all store their PPE in the same lockers, at the same plant, and all are required to don and doff their PPE." App. 99a. "[M]ost all gang time employees wear at least the same basic PPE and use some kind of knife or tool." App. 101a. Thus, "there is not an indefinite amount of PPE to don and doff or tools to be used." App. 100a-101a.

Tyson's practice of rotating workers "quite often" between jobs that require knives and those that do not minimized any variation. JA210, 224-25, 235-36. Rotation occurs during the day or day-to-day; on a given day an employee might work a job that does not require a knife but switch to a job that does require a knife later the same day or the following day. JA210, 234-36.

3. Tyson's K-Code policy failed to pay any wages for time spent donning or doffing "standard" gear that was not "unique" to the meatpacking industry, including frocks, whites, rubber aprons, rubber gloves, rubber sleeves, cotton gloves, hairnets, beardnets, hardhats, and work glasses. JA176-78,

437-39. Tyson also paid no wages for time spent walking with company-issued gear and equipment to and from the locker room—time this Court held is compensable in *Alvarez*, 546 U.S. at 31-32, 37. JA121-22, 439-40. Because Tyson routinely scheduled all workers for six shifts a week in order to run the production line on Saturdays, that uncompensated time typically qualified for overtime compensation. JA182, 326, 437.

In February 2007, Tyson adjusted its K-Code policy to pay employees who worked with knives an additional 1-4 minutes of K-Code time to account for walking to and from the locker room. JA121-22. However, Tyson ceased paying employees who did not work with knives any time for any donning, doffing, or walking activities. JA121. Tyson continued to base K-Code compensation on averages from its 1998 time study. JA121. Throughout the class period, Tyson violated its statutory recordkeeping obligations and the *Reich* injunction by failing to record the amount of time workers spent performing these activities, including at Storm Lake. JA146-47, 174-76, 214-15.

On June 28, 2010—the class period cut-off date—Tyson increased the amount of K-Code time it paid to Slaughter and Processing employees to at least 20 minutes per shift, based on a new time study. *See* Def.'s Memo. of Law in Support of Its Mots. in Limine at 1-2, Dkt. 156-1.

C. Pre-Trial Proceedings

Respondents are employees on the Slaughter and Processing floors at Storm Lake who were paid via

the gang-time system. App. 92a, 110a.[2] In 2007, respondents filed a collective and class action, seeking compensation from Tyson under both the FLSA and the IWPCL for not paying overtime for company-required donning, doffing, and walking before and after shifts and during meal breaks. JA27, 39-42. Both claims have the same elements and standard of proof. *See* App. 5a n.2; JA479.

Respondents proposed a class including all workers at Storm Lake. The district court certified a Rule 23(b)(3) class on the state-law claim and granted conditional certification of an FLSA collective action. App. 41a-113a. Because the named plaintiffs were all Slaughter and Processing employees paid by gang-time, and because other employees at the facility were not paid by gang-time, the court narrowed the definition to include only employees on the Slaughter and Processing floors at Storm Lake who were paid under Tyson's gang-time system. App. 92a, 110a.

The court found that this narrowed class satisfied Rule 23. It determined that Tyson set a uniform compensation policy applicable to all class members. Respondents thus met Rule 23's "commonality requirement because they all share the common question of whether Defendant Tyson has violated [state law] by not paying production workers at its

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[2] Contrary to Tyson's suggestion (at 6), the class did not include employees to the extent they received additional pay for setting up or cleaning up the production line. JA433-34. Such employees were not paid by gang-time, App. 84a-85a, but from "clock in to clock out," C.A. App. 212. To the extent those employees were not paid by gang-time, they are excluded from the class and the collective-action definitions. App. 92a, 110a.

Storm Lake, Iowa, facility for all work performed prior and subsequent to 'gang time.'" App. 97a (internal quotations omitted). The court further found that alleged "factual differences regarding the clothing and equipment" did not "defeat commonality among all employees paid on a gang time basis." App. 99a.

The court further concluded that common issues predominated over any individualized questions under Rule 23 because "common evidence that Tyson's compensation system cannot account for even the basic or standard PPE employees need to don, doff, and clean would establish a prima facie case for the class." App. 109a. The court also found that plaintiffs were "similarly situated" under the FLSA. App. 91a-93a.

Tyson did not oppose certification of the class or collective action on the ground that differences in the knife-safety PPE worn by employees would require individualized determinations of the time spent donning or doffing that would predominate over other questions. In opposing certification, Tyson argued that "[t]hree substantive legal issues *will dominate*" the litigation: (i) whether the activities at issue are "work" under the FLSA, (ii) whether they are "integral and indispensable" to plaintiffs' principal activities and therefore exempt under the Portal-to-Portal Act, and (iii) whether they are de minimis. Def.'s Resistance to Pls.' Mot. for Conditional Certification at 3, Dkt. 49 (emphasis added). According to Tyson, certification was inappropriate because these issues were not common. *Id.*

Before trial, Tyson moved to decertify the class in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See* App. 31a. Again focusing on commonality, Tyson moved for decertification based on alleged variations in the time spent by class members. Def.'s Mem. in Support of Its Mot. for Decertification of Rule 23 Class at 10, Dkt. 212-1. The court rejected Tyson's attempted analogy to *Wal-Mart*, "where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process." App. 37a. This case, by contrast, presented the common question whether Tyson, through its "company wide compensation policy" that is "applied uniformly throughout defendant's entire Storm Lake facility," had "paid its production workers for all 'work' performed prior and subsequent to 'gang time,' particularly the time spent donning, doffing, and cleaning' required equipment. *Id.* The court explained that, "[i]f it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes 'work' for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs." *Id.*

Respondents proposed bifurcating the trial so individual backpay amounts would be calculated separately after the common-liability phase. JA112-13. Tyson successfully opposed bifurcation as a "waste of resources," JA115, so damages and liability were tried together, JA486-88.

D. Trial Proceedings

1. At trial, four of the five questions tried to the jury were purely common issues: (1) whether donning and doffing sanitation gear and standard PPE were

"work" under the FLSA, (2) whether those activities were exempt from the FLSA's coverage under the Portal-to-Portal Act's exemption of "preliminary" and "postliminary" activities, (3) whether Tyson's meal break was bona fide, and (4) whether the de minimis exception applied to any of the contested activities. JA486-88 (verdict form). Tyson officials conceded that during the class period they did not pay workers for donning and doffing of required sanitation equipment and standard PPE (such as aprons, boots, frocks, hair nets, and rubber gloves), JA176-78, 437-39; and that they did not pay workers for walking to and from the locker room before February 2007, JA439-40.

Tyson officials also acknowledged they did not record workers' donning, doffing, washing, and walking time, JA146-47, 174-76, 214-15, although they conceded they could have done so by positioning punch-clocks outside the locker rooms and mandating that employees avoid detours between the locker room and the production line, JA207-09. Because Tyson kept no records of the actual time respondents spent donning, doffing, and walking, respondents relied on a variety of other evidence to establish those amounts of time. First, as in *Mt. Clemens*, several class members testified about the time they worked. JA255-65, 284-90, 306-09, 310-13. Second, the jury viewed videotapes of employees donning and doffing equipment on a typical workday at Storm Lake. *See, e.g.*, JA156-59. Third, the jury heard evidence that Tyson regarded the time employees spent as uniform enough to justify its policy of paying the same K-Code time to all Slaughter and Processing employees for donning and

doffing based on its own industrial engineers' study of average times. JA446-55; *see infra* pp. 18-19.

Finally, respondents presented a time study by an industrial-relations expert, Dr. Kenneth Mericle, to demonstrate the time spent by workers donning and doffing. JA336-45. A time study estimates the amount of time for employees to perform a task. JA336. Dr. Mericle's study was based on 744 videotaped observations of Storm Lake employees during two regular work days. JA336-45. Dr. Mericle recorded stopwatch measurements of the time each worker spent on donning and doffing tasks each day. *Id.* To determine walking time, Dr. Mericle used distances between relevant parts of the facility and applied standardized walking speeds, an "accepted procedure in industrial engineering." JA345, 363.

Dr. Mericle testified that his 744 observations were a high number for such a time study. JA358. He stated that his observed times were probably conservative, because he did not measure donning activities that workers completed while walking to the production floor and because Tyson officials had accompanied him during his observations—a practice that tends to make workers move faster than normal. JA356-58, 361-62. He further testified that, although the employees he videotaped were not selected on a strictly random basis—they were simply those workers who worked on the two days the study was performed—his sampling method "approximated random representation," because he did not preselect individuals known to be particularly fast or slow. JA359. Tyson relied on similar time studies to determine its K-Code time, JA446-55, and did not seek to exclude Dr. Mericle's testimony under

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Dr. Mericle calculated average times for donning, doffing, and walking of 18 minutes for workers in the Processing department and 21.25 minutes for workers in the Slaughter department. JA361-62. Most of the observed times clustered around the average. JA348. During trial, Dr. Mericle refined his calculations using statistical methods to exclude outliers, resulting in a 24-second decrease in the average total time for Slaughter and a 76-second decrease in the average total time for Processing. JA394-402.

Dr. Liesl Fox, a statistician whose qualifications were also unchallenged, applied Dr. Mericle's results to calculate the uncompensated time each individual employee worked. For each of the 3,344 class members, Dr. Fox added the donning, doffing, and walking times determined by Dr. Mericle's time study to Tyson's own records showing each worker's time on the production line. She then subtracted the amount of time Tyson's records showed each worker had been paid. Dr. Fox thus calculated, for each individual employee, whether the additional time entitled the worker to overtime pay and, if so, precisely how much additional overtime pay each individual worker was owed. JA403-08.

Using this methodology, Dr. Fox calculated that Tyson had unlawfully undercompensated more than 3,000 class members. Dr. Fox's individualized calculations showed that 212 workers—likely part-time employees—were entitled to no damages because they did not work more than 40 hours in any

workweek. JA415, 429-30. Dr. Fox specifically identified each worker not entitled to damages.

Respondents asked the jury to award a total of $6,686,082.36 in damages—the sum of the individual damages suffered by the more than 3,000 injured class members calculated by Dr. Fox. JA465. Dr. Fox also presented a calculation using Dr. Mericle's refined results, which resulted in total damages of $6,198,191.67. JA428-29. The jury also viewed spreadsheets containing Dr. Fox's individualized damages calculations for each class member. C.A. App. 904-72, 1004-83.

2. Tyson cross-examined Drs. Mericle and Fox but did not present an independent rebuttal expert. Moreover, Tyson's own industrial engineer, Jim Lemkuhl, corroborated the reliability of Dr. Mericle's methodology. Lemkuhl testified that Tyson based its K-Code payments on an internal time study of donning and doffing times performed in 1998. JA446-55. In that study, Tyson positioned engineers where donning and doffing took place and observed whichever workers happened to arrive, JA462—just as Dr. Mericle did in his study, JA358-59. Tyson then averaged together different employees' donning and doffing times, JA453-55—like Dr. Mericle's study, JA336-37. Tyson's study, unlike Dr. Mericle's, even averaged different employees across different plants. JA453-55.

When asked about Tyson's method of timing employees donning specific items in isolation, as compared to Dr. Mericle's method of timing employees putting on all their gear together, Lemkuhl admitted the equipment was "an ensemble" and that, in his professional judgment, donning and

doffing of all equipment should be studied in combination. JA458-59. Lemkuhl also admitted that, for some items in its multi-plant study, Tyson did not observe someone in each plant, JA461, and that Tyson never studied certain gear that workers are required to wear, including aprons, frocks, whites, hairnets, beardnets, earplugs, and muffs, JA457. When Tyson decided in 2007 to begin paying some workers for walking to and from the locker room, it multiplied the measured distance by a standard walking speed, JA443-45—just as Dr. Mericle did, JA345, 363.

3. Tyson did not object to the jury instructions, JA464, which required completion of a special verdict form posing yes/no questions to determine liability, JA486-88. The court instructed that "[y]ou may not award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid." JA471-72. "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." JA481.

At Tyson's request, the court instructed the jury it could award damages to non-testifying class members based on "representative evidence." JA472. Tyson's proposed instruction, which was given nearly verbatim, stated that, "if some employees testify about the activities they allegedly performed or the amount of unpaid overtime they allegedly worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This is called 'representative testimony.'" JA93 (proposed instruction); JA472 (actual instruction). Consistent

with *Mt. Clemens*, the jury was also instructed, again at Tyson's request, that plaintiffs carried their burden to prove damages

> if they prove that the employees have in fact performed work for which they were not paid and produce sufficient evidence to show the amount and extent of such work *as a matter of just and reasonable inference.*
>
> The burden then shifts to the defendant to come forward with evidence of the precise amount of uncompensated work performed or with evidence to negate the reasonableness of the inference to be drawn from plaintiffs' evidence. *If the defendant fails to produce such evidence, you may then award damages to the employees even though those damages will only be approximate.*

JA480-81 (emphases added); *cf.* JA100-01 (Def.'s proposed jury instruction No. 23).

Tyson also proposed, and the court adopted, a verdict form calling for the jury to provide a single total damages award. *See* JA8, 102-04 (Tyson's proposed verdict form), 486-88 (actual verdict form).

4. The jury returned a verdict for respondents. JA486-88. The jury found that: the donning and doffing was work; that work was integral and indispensable to the workers' principal activities and therefore not exempt under the Portal-to-Portal Act; it was not de minimis; and Tyson did not fully compensate its employees for that work. *Id.* However, the jury found in Tyson's favor that the meal breaks were bona fide and therefore not compensable. *Id.* The jury awarded compensatory damages of approximately $2.89 million. JA488.

The court awarded an equal amount in liquidated damages, resulting in a judgment of approximately $5.8 million. JA20.

The court denied Tyson's post-trial motions, including a motion to decertify the class on the ground that individual issues would predominate in the litigation. App. 30a.

E. Appellate Proceedings

1. The court of appeals affirmed. The court rejected Tyson's argument that variations among class members in donning and doffing time defeated class certification under *Wal-Mart*. The court explained that, unlike in *Wal-Mart*, Tyson applied a single policy to all class members. App. 8a. Moreover, because Tyson violated its statutory recordkeeping obligations, respondents could rely on representative proof under *Mt. Clemens*. *Id.* Respondents' time-study evidence was "comparable" to the evidence in *Mt. Clemens* and could likewise establish the amount of uncompensated time for the class. App. 11a. The court further noted that the class used individual employee time records, App. 10a, to "apply this [representative] analysis to each class member individually," App. 11a. The court thus rejected Tyson's claim that this was an inappropriate "trial by formula." App. 10a-11a.

The court also rejected Tyson's argument that insufficient evidence supported the verdict, finding that Dr. Mericle's time study employed a well-accepted and reliable methodology because of its large and representative sample. The court declined to address Tyson's argument that a class cannot contain any uninjured members, because Tyson's requested jury instructions invited any error. App. 8a-10a.

Judge Beam dissented, arguing that individual differences in donning and doffing times made class treatment inappropriate, App. 21a-23a, and that the class and collective claims should have been treated separately, App. 23a-24a.

2. The court denied Tyson's petition for rehearing and rehearing en banc. App. 114a. Judge Beam again dissented, arguing that the panel decision misapplied *Mt. Clemens*, App. 119a-122a, and that the verdict would compensate individuals with no or de minimis damages, App. 122a-125a. Judge Benton's separate opinion defending the panel's decision observed that "[t]he [district] court, without objection, instructed the jury *only* as to aggregate damages." App. 130a (citing the verdict form; emphasis added). He further explained that, based on the jury instructions, "employees without damages are not entitled to allocation of the award." App. 131a.

SUMMARY OF ARGUMENT

I. The district court properly exercised its discretion in concluding that common questions would dominate this litigation.

A. Rule 23(b)(3) requires that common issues "predominate" over individualized ones. Evaluation of the common issues in a class action includes the substantive legal standards underlying the claims. This Court's *Mt. Clemens* decision provides an evidentiary standard to apply when a company such as Tyson fails to comply with its statutory recordkeeping requirements.

B. Indisputably common issues predominated. Respondents' claims raised four common contentions about whether their work was compensable under federal and state wage-and-hour laws: (1) whether

the activities at issue were "work," (2) whether they were exempt from FLSA coverage under the Portal-to-Portal Act, (3) whether Tyson's meal break was bona fide, and (4) whether the de minimis exception applied.

Those questions were central throughout the litigation. Tyson admitted it adopted a company-wide policy of not paying wages to any class members for walking time (for part of the class period) or time spent donning and doffing the company's sanitation gear and standard PPE. Tyson defended that practice on a classwide basis, contending that respondents' activities were not compensable because those activities were (1) not "work"; (2) not "integral and indispensable" to workers' principal activities under the Portal-to-Portal Act; and (3) de minimis. Tyson conceded that those issues would "dominate" the litigation and did not argue that the number of hours individuals spent on compensable work would predominate over them.

The course of the trial confirmed the predominance of common issues. Four of the five questions on the verdict form were compensability issues, JA486-88, which Tyson ignores in its opening brief. The court did not abuse its discretion in finding—as Tyson itself conceded—that issues regarding the compensability of respondents' work predominated.

C. The sole issue Tyson now claims is individualized is the number of hours class members spent on compensable activities. Had Tyson retained proper records of those hours, as required by the FLSA and Iowa law, resolving that issue would have been mechanical and common compensability questions would clearly predominate.

Because Tyson violated its statutory recordkeeping duties, respondents relied on *Mt. Clemens* to demonstrate the "approximate" time worked "as a matter of just and reasonable inference." 328 U.S. at 687-88. The *Mt. Clemens* rule operates like other evidentiary principles affirmed by this Court, and its reasonable approximation standard "is an objective one" that "can be proved through evidence common to the class." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013) (internal quotations omitted).

Consistent with *Mt. Clemens*, respondents adduced common evidence sufficient to approximate class members' compensable time and facilitate the damages computation. Respondents offered testimony of representative plaintiffs at trial, as in *Mt. Clemens*, 328 U.S. at 683, and also presented a reliable time study using the average of a large number of observations of plant workers. Dr. Mericle's time study was *more* rigorous than the sample employee testimony accepted in *Mt. Clemens*, which involved eight workers testifying on behalf of 300. *Mt. Clemens* enabled respondents to prove the amount of compensable time with common evidence for the entire class.

Tyson's attacks on the lower courts' reliance on *Mt. Clemens* are unpersuasive. *Mt. Clemens* forecloses Tyson's complaint (at 35) that Dr. Mericle's time study improperly "mask[ed] differences among class members." Dr. Mericle's study provides precisely the sort of common proof sufficient to create a "just and reasonable inference" for all employees. 328 U.S. at 688. Tyson's argument that this Court should limit *Mt. Clemens* to determining the amount of damages rather than whether plaintiffs have

exceeded the overtime threshold lacks support in precedent or logic: in both cases the evidence proves by inference the amount of time worked. The theoretical possibility that Tyson might have attempted to rebut the class's proof with individual evidence did not defeat predominance because Tyson offered no reason to think such evidence would overwhelm common issues.

D. The district court also did not abuse its discretion in certifying the FLSA class. Tyson concedes the FLSA collective-action standard is no *more* stringent than Rule 23. Tyson offers no sustained argument that the FLSA's separate "similarly situated" requirement is not met. The FLSA's plain text does not require predominance.

E. Tyson's arguments that certifying the class violated the Rules Enabling Act and the Due Process Clause lack merit. Certification did not lessen respondents' burden of proof: the district court properly applied *Mt. Clemens*' evidentiary standard, a *substantive* rule of law triggered by Tyson's violation of recordkeeping requirements. Tyson had every opportunity to rebut respondents' classwide proof by presenting evidence of actual time worked or rebutting respondents' inferential proof. Tyson's repeated invocation of the *Wal-Mart* mantra "trial by formula" is misplaced. *Wal-Mart* disapproved certification where the plaintiffs sought to prove each class member's separate discriminatory treatment from a sample set of class members. Nothing like that occurred here: respondents relied on ample representative proof, as expressly approved in *Mt. Clemens*, to address the employer's classwide non-compliance with mandatory recordkeeping requirements.

II. Tyson now concedes respondents are correct on the second question presented: Article III, it acknowledges (at 49), "does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." That concession flows from the well-settled principle that a court has jurisdiction if a single plaintiff has standing—a principle as applicable to class actions as to other joinder mechanisms. Because Tyson no longer contests that proposition, this Court should either affirm on the second question or dismiss the petition on that question as improvidently granted.

Tyson also presses a new argument, not raised in its petition—that the district court erred by "*award[ing] damages* to class members who cannot prove injury." Pet. Br. 46 (emphasis added). The Court should not reward Tyson's shifting tactics by considering that contention. Nonetheless, Tyson's argument is baseless. It rests largely on the verdict's award of a single, unallocated sum to the whole class. Tyson invited any such error by insisting on an aggregated verdict, and it lacks standing to complain about allocation of the verdict, which cannot change Tyson's liability. In any event, the judgment does not award damages to, or on account of, uninjured people. The jury was instructed not to award damages to uninjured class members and had the evidence needed to avoid doing so. Finally, Tyson's passing challenges (at 53) under the Seventh Amendment and the Due Process Clause also lack merit, because court approval of an allocation plan would neither reopen the judgment nor reallocate damages.

ARGUMENT

I. CERTIFICATION WAS PROPER BECAUSE THE COMPENSABILITY OF RESPONDENTS' WORK AND THE REASONABLENESS OF THEIR TIME ESTIMATES WERE COMMON TO THE CLASS

A. Predominance Is Satisfied Under Rule 23(b)(3) If Common Issues Outweigh Individualized Issues

Rule 23(b)(3) provides that a damages class action satisfying Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation may be certified if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Commonality (which Tyson no longer contests) requires at least one "common contention" whose resolution will resolve a "central" issue "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," only that common questions "predominate" over individualized ones. *Amgen*, 133 S. Ct. at 1196 (internal quotations and alterations omitted); *American Heritage Dictionary of the English Language* (5th ed. 2011) ("predominate" means "[t]o be of or have greater quantity or importance"). If questions affecting only individual class members do not "overwhelm common ones," *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("*Halliburton II*"), the class is

"sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

The certification inquiry must reflect substantive legal standards applicable to plaintiffs' claim, as Tyson concedes (at 23). This Court repeatedly has looked to relevant substantive law in deciding whether certification is proper. *See Erica P John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (certification depends on "elements of the underlying cause of action"); *Wal-Mart*, 131 S. Ct. at 2551-52 (certification is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (internal quotations omitted). Because a key question is whether plaintiffs can establish their claims through "classwide proof," *Amgen*, 133 S. Ct. at 1196, predominance must consider evidentiary standards—such as the *Mt. Clemens* standard—that permit use of common evidence. *See Halliburton II*, 134 S. Ct. at 2412 (finding predominance satisfied in securities-fraud cases because fraud-on-the-market evidentiary presumption of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), obviates the need to prove individual reliance).

Certification is a highly contextualized inquiry based on the facts and the parties' actual litigation positions. *See Amchem*, 521 U.S. at 630 (Breyer, J., concurring in part and dissenting in part) (certification raises "highly fact-based, complex, difficult matters"). As *Wal-Mart* counseled, courts should focus on questions actually "apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (internal quotations omitted); *see also Amchem*, 521 U.S. at 623 (predominance "inquiry trains on the legal or factual questions that qualify each class

member's case as a genuine controversy"); Fed. R. Civ. P. 23(b)(3)(A)-(D) (listing "pertinent" factors reinforcing practical nature of predominance inquiry). Consequently, whether to certify a class is committed to the district court's sound discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Abuse of discretion is a "difficult standard" to meet, *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 408 (1990), as it "reflects the district court's superior familiarity with, and understanding of, the dispute," *United States v. Clarke*, 134 S. Ct. 2361, 2368 (2014).

B. As Tyson Admitted Below, Compensability Issues "Dominate[d]" The Litigation

The district court acted well within its discretion in concluding that common questions regarding the compensability of respondents' work activities would predominate. Respondents' claims raised four "common contention[s]," *Wal-Mart*, 131 S. Ct. at 2551, under federal-law and state-law wage-and-hour standards: (1) whether respondents' activities were "work," (2) whether they were exempted under the Portal-to-Portal Act, (3) whether Tyson's meal break was bona fide, and (4) whether the de minimis exception applied.

Those questions were "central" throughout the litigation. *Id.* Respondents proved that virtually all class members worked significantly more than 40 hours per week without the unpaid time because Tyson's officials admitted that the vast majority of class members routinely worked six-day, 48-hour workweeks. JA122, 181-82, 326, 437. The fact of unpaid wages was also established by Tyson's admission that it adopted a company-wide policy of not paying wages to class members for walking time

or time spent donning and doffing the company's sanitation gear and standard PPE—equipment every class member was required to use, which did not vary among class members in the same department. *See supra* pp. 9-10.

Tyson's defense throughout was that respondents' activities were not compensable because they were (1) not "work"; (2) not "integral and indispensable" to workers' principal activities under the Portal-to-Portal Act; and (3) de minimis. *See supra* p. 13. Indeed, in opposing certification, Tyson conceded that those issues would "dominate" the litigation:

> Three substantive legal issues will dominate this FLSA litigation: (i) whether the clothes-changing and washing activities are "work" for purposes of the FLSA; (ii) which specific pre- and post-shift clothes-changing or sanitizing activities, if any, are "integral and indispensable" to plaintiffs' principal production activities within the meaning of the Portal-to-Portal Act and thereby commence and end the continuous workday, and (iii) whether, even if the activities are otherwise compensable, they are *de minimis* and therefore not compensable.

Def.'s Resistance to Pls.' Mot. for Conditional Certification at 3, Dkt. 49; *see also id.* at 26-27. Tyson argued that those questions were not common—a point the district court rejected, Tyson did not challenge below, and is no longer disputed here. But Tyson did not argue that the number of hours spent on compensable work would predominate over those questions. Tyson waived that argument by not raising it—and, indeed,

arguing the contrary—below. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (per curiam).

The trial confirmed the district court's conclusion that the common compensability questions would "drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (internal quotations omitted). Tyson's opening statement distilled two key issues "in dispute": (1) whether donning and doffing "standard items" was "integral and indispensable" and thus compensable under the FLSA; and (2) whether Tyson properly compensated workers for time donning and doffing "knife-safety" gear, like belly guards. Trial Tr. 27-28. Tyson's counsel argued that its "defenses" were that (1) donning and doffing standard items is not "work" because it requires no exertion; (2) donning and doffing PPE is not "work" because it is "primarily for the benefit of the employee" rather than Tyson; (3) donning and doffing is not compensable under the FLSA because it is "preliminary"; and (4) donning and doffing time was "de minimis." *Id.* at 32-33.

Most of the trial focused on common proof regarding those questions. Storm Lake managers testified about whether Tyson's PPE policies were primarily for the benefit of Tyson, workers' practices during meal breaks, and Tyson's recordkeeping practices regarding donning and doffing time. *Id.* at 40-176, 407-545, 545-57, 716-29. Storm Lake's human resources and payroll managers explained Tyson's gang-time system. *Id.* at 176-344, 345-406.

Tyson's witnesses also focused on classwide compensability issues. Tyson called a safety manager to testify that workers wore PPE for their own safety rather than Tyson's benefit; and its

human resources director, who testified regarding Tyson's PPE requirements, the practicability of having workers clock in before donning PPE, and the meal break schedule. *See, e.g., id.* at 1467, 1472, 1474. Mr. Lemkuhl testified about the K-Code system and its origin in the 1998 time study he performed. *See supra* p. 18.

Finally, four of the five jury verdict form questions were compensability issues. JA486-88. Tyson all but ignores these common questions. But the district court's ultimate decision to maintain certification—made after trial—was not an abuse of discretion in finding, as Tyson had conceded, the issues regarding the compensability of respondents' work predominated.[3]

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[3] The common compensability questions suffice for certification under the rule—adopted by all eight courts of appeals that have considered the issue—that individual damages calculations do not categorically defeat predominance. *See Neale v. Volvo Cars of N. Am., LLC*, 2015 WL 4466919, at *17 (3d Cir. 2015); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402 (2d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23, 25 (1st Cir. 2015); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257-58 (10th Cir. 2014), *pet. for cert. pending*, No. 14-1091 (filed Mar. 10, 2015); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir.), *cert. denied*, 135 S. Ct. 754 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013); *cf. Reyes v. Netdeposit, LLC*, 2015 WL 5131287, at *7 n.12, *15 (3d Cir. 2015) (stating in dicta in a footnote that damages must be measurable on classwide basis, but reaffirming in the main text that "Rule 23 does not require the absence of all variations in a defendant's conduct or the elimination of all individual

(*Footnote continued*)

C. Under *Mt. Clemens*' Inferential Proof Standard, Individual Questions Do Not Predominate

1. Had Tyson retained required time records, common issues indisputably would have predominated

The sole individualized issue now claimed by Tyson is the number of hours class members spent on compensable activities. Had Tyson maintained records of those hours, respondents would have had precise information regarding the time each employee spent on compensable but uncompensated donning, doffing, and walking activities. Then, exactly as Dr. Fox did, they would have added those hours to the number of hours Tyson recorded for each employee's work on the production line.

Under those circumstances, the question of each employee's hours and damages would not defeat predominance. The need for mechanical computation does not raise the specter of individual mini-trials or undermine the ability of a single proceeding to resolve class members' claims "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551; *see Halliburton II*, 134 S. Ct. at 2415 (approving use of far more complex

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circumstances"). Although this Court in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), criticized the plaintiffs for not "establish[ing] that damages are capable of measurement on a classwide basis," *id.* at 1433, the Court did not decide whether Rule 23(b)(3) requires a classwide measure of damages because the plaintiffs had stipulated that a classwide measure was necessary for predominance in that particular case. The Court need not decide the issue here because, as explained below, the issue of time worked was also subject to common proof under *Mt. Clemens*.

computations). Accordingly, lower courts agree that the need to compute damages "according to some formula, statistical analysis, or other easy or essentially mechanical methods" poses no impediment to class certification. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004) (footnotes omitted), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also, e.g., Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (citing cases); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 67-68 (4th Cir. 1977) (en banc).

Common evidence also established that almost all class members worked more than 40 hours a week, even without the additional time established by Dr. Mericle's time study. JA182, 326, 437. Thus, if Tyson had maintained legally required time records, the class easily would have met Rule 23's predominance standard.

2. *Mt. Clemens* permits reasonable classwide approximations to prevent defendant's recordkeeping violations from impeding classwide resolution

Having violated its statutory obligations, Tyson argues that the absence of time records required mini-trials regarding the precise time each employee spent on uncompensated activities, and that those individualized inquiries "overwhelm" the common questions. *Mt. Clemens* forecloses that argument.

Mt. Clemens holds that, when an employer violates the law by failing to keep records of time worked, employees can prove the "approximate" time worked "as a matter of just and reasonable inference." 328 U.S. at 687-88. The employees'

reasonable approximation shifts the burden to the employer to prove actual time worked or to negate the reasonableness of inferences from plaintiffs' evidence. *Id.* *Mt. Clemens*' evidentiary standard is a substantive rule of law permitting all class members to proceed based on an objective standard (reasonable approximation), pursuant to common proof. *Mt. Clemens* facilitated class certification by obviating the need for individualized inquiries into each employee's actual uncompensated hours.

The *Mt. Clemens* rule operates like the fraud-on-the-market presumption established in *Basic* and reaffirmed in *Halliburton II*. That presumption permits securities-fraud plaintiffs to prove reliance based on "objective," "classwide" evidence and prevents individualized reliance questions from "overwhelming" common ones. *Halliburton II*, 134 S. Ct. at 2407-08, 2416; *accord Amgen*, 133 S. Ct. at 1195-96. Likewise, *Mt. Clemens*' reasonable approximation standard "is an objective one" that "can be proved through evidence common to the class." *Id.* at 1195 (internal quotations omitted).

In *Mt. Clemens*, "testimony from eight employees established liability for 300 similarly situated workers." App. 11a. Although the eight employees' estimates of their compensable walking time ranged from 30 seconds to 8 minutes, their testimony sufficed to "approximate" the entire class's compensable hours. *See* 328 U.S. at 688; *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 461-63 (6th Cir. 1945). Because, as the district court and the court of appeals held and Tyson does not challenge, the same substantive standards apply to both Iowa law and the FLSA claim, App. 5a n.2; JA479, *Mt. Clemens* determines how employees may

prove the amount of time worked when an employer has not kept records.

The rationale for *Mt. Clemens* burden-shifting is that the employer created the problem of proof by breaking recordkeeping laws: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of the [FLSA]." 328 U.S. at 688; *see also* Iowa Admin. Code 875-216.2(1)(g) (parallel Iowa recordkeeping requirement). Allowing such an objection would "place a premium on an employer's failure to keep proper records in conformity with his statutory duty." 328 U.S. at 687. Such a presumption relieves plaintiffs "of an unnecessarily unrealistic evidentiary burden," *Halliburton II*, 134 S. Ct. at 2407 (internal quotations omitted), by placing the onus on the party in the "position to know and to produce the most probative facts concerning the nature and amount of work performed," *Mt. Clemens*, 328 U.S. at 687. *Mt. Clemens* burden-shifting incentivizes legal compliance, puts the burden on the party best equipped to bear it, and avoids the perverse consequence of allowing employers that violate recordkeeping requirements to shield themselves from liability for wage-and-hour violations.

Legal uncertainty does not excuse an employer's failure to keep records, as *Mt. Clemens* explained: "[E]ven where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most

accurate basis possible under the circumstances." *Id.* at 688.

Mt. Clemens burden-shifting has been established law for nearly 70 years and this Court has never questioned it. Every federal circuit has adopted it as a settled evidentiary principle. *See, e.g., Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 306 (5th Cir. 1998); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994).

Similar burden-shifting requirements exist throughout the law, based on the "ancient" premise of equity that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (permitting proof by inference in antitrust case, and noting its use in admiralty, confusion of goods, and intellectual property); *see also, e.g., Combs v. King*, 764 F.2d 818, 826-27 (11th Cir. 1985) (permitting burden-shifting by analogy to *Mt. Clemens* under ERISA); *Am. Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1409-10 (10th Cir. 1984) (same, under Service Contract Act). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery . . . Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." *RKO*, 327 U.S. at 264-65. The *Mt. Clemens* burden-shifting framework was crafted for precisely the circumstances of this case.

Indeed, *Tyson* conceded *Mt. Clemens*' applicability below. It asked the district court to instruct the jury that it could infer from testimony about time spent

by one worker that other workers in substantially similar positions spent the same amount of time. JA93. The instructions given were practically identical to Tyson's proposal. JA472. And none of Tyson's briefing on certification before trial objected to inferential proof under *Mt. Clemens*. *See* Dkts. 45, 49, 212-1, 226-1.

3. Consistent with *Mt. Clemens*, respondents proved the approximate amount of compensable time through common evidence

As *Mt. Clemens* permitted, respondents adduced common classwide evidence sufficient to approximate class members' compensable time and allow the resulting computation of damages. Respondents offered testimony from several representative plaintiffs at trial, as in *Mt. Clemens*, 328 U.S. at 683, and also presented a reliable time study performed by Dr. Mericle using the average of hundreds of observations of workers at the plant. Indeed, Dr. Mericle's time study was *more* rigorous than the sample employee testimony accepted in *Mt. Clemens*, which involved eight workers testifying on behalf of 300 with no objective observations of employees' activities. Under *Mt. Clemens*' reasonable-approximation standard, respondents could use such common evidence to prove the amount of compensable time for the entire class, so individual issues did not predominate. *See* App. 8a.

Accordingly, Tyson's repeated suggestion that respondents' case assumed that the time they spent donning and doffing was equal to that of a "hypothetical" or "average" worker misunderstands the *Mt. Clemens* rule. When employees proceed

under *Mt. Clemens*, they do not ask the fact-finder to make any such "assumption." Rather, they ask the fact-finder to draw a "just and reasonable inference" using the "average" times as a fair approximation. 328 U.S. at 686-88. Here, consistent with *Mt. Clemens* and Tyson's own proposed instruction, the district court properly instructed the jury that it could draw an inference from respondents' classwide evidence, including representative class members' testimony, 744 videotaped observations, and Dr. Mericle's time study. JA472.

Tyson's attacks on the lower courts' reliance on *Mt. Clemens* are unpersuasive.

a. Tyson contends (at 35) respondents' time-study evidence was not common because it "mask[ed] differences among class members." But *Mt. Clemens*' core holding is that, where the defendant has deprived workers of accurate records, proof of the *precise* number of hours each employee worked is *not* "essential to determining" liability or damages. Workers may satisfy their evidentiary burden through reasonable approximation under an objective, classwide standard. Lower courts therefore regularly allow proof of wage-and-hour claims using time studies or other measures that average time worked by different workers. *See, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1306-07 (10th Cir. 2014); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 370-72 (4th Cir. 2011); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981).

Tyson nonetheless contends that the differences here were too great to allow classwide representative evidence. But that assertion challenges the sufficiency of respondents' evidence, not the propriety

of class certification. *See* Pet. Br. 33-35 (arguing respondents could not "prove" their damages); *see also* Civil Procedure Scholars Amicus Br. 24 (arguing evidentiary insufficiency). Respondents need not "win the fray" to show *certification* was proper. *Amgen*, 133 S. Ct. at 1191. The sufficiency of their evidence, as opposed to whether the case was triable as a class action, is outside the question presented.

In all events, the differences among respondents are much smaller than those among the employees in *Mt. Clemens*. There, minimum distances between time clocks where employees punched in and their working places "var[ied] from 130 feet to 890 feet," and "estimated walking time rang[ed] from 30 seconds to 3 minutes," with some estimates "as high as 6 to 8 minutes." 328 U.S. at 683. Moreover, "employees perform[ed] various [allegedly compensable] preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* The Court held that testimony of eight representative plaintiffs created a "just and reasonable inference" for all 300 employees despite these differences. *Id.* at 687-88.

The evidence here supports an even stronger inference. As the district court found, "most all [class members] wear at least the same basic PPE and use some kind of knife or tool," and "there is not an indefinite amount of PPE to don and doff or tools to be used, and thus the factual variations between employees paid via gang time are limited." App. 101a. *All* employees were required to walk to the

production line from the locker room with required gear, JA150, and *all* employees were required to wear basic sanitation gear, JA233-34. Although Tyson seeks to distinguish knife-wielders from non-knife-wielders, employees rotated between those categories. JA234-35, 236. Tellingly, Tyson itself considered respondents sufficiently alike that it used a similar time-study methodology to determine the amount of its K-Code time.

Moreover, Tyson's suggestion (at 11) that there were vast differences in the time it takes to don and doff gear misapprehends the factual record and Dr. Mericle's time study. The observations at the very low end of the range resulted in part from the fact that some employees continued to don and doff their gear after they left the locker room. JA350-51. Because Dr. Mericle's conservative methodology did not include those employees' donning and doffing between the locker room and the production floor, it overstated the variations in workers' donning and doffing times and understated the average times for the group.

Tyson's reliance on *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), is misplaced. Even assuming *Espenscheid* was correct in resolving the issue at the class-certification stage, the variations among employees were different in kind from those here. There, the employees were home-satellite repair technicians paid per job, not per hour, *id.* at 772-73, so the "hourly wage varie[d] from job to job and worker to worker," *id.* at 774. The plaintiffs alleged that the employer forbade them from reporting certain hours, *id.* at 773, but some further underreported their time not because of that policy "but because [they] wanted to impress the company

with [their] efficiency," *id.* at 774. Compounding these problems was the absence of any "suggestion that sampling methods used in statistical analysis were employed." *Id.* Here, by contrast, plaintiffs' expert testified that his time study contained a large number of observations, JA358, and that the study was representative and "approximate[d] random representation," JA359. *Espenscheid*'s conclusion that differences among employees were too great to support a "just and reasonable inference" on that case's distinct factual record does not suggest the same result here given the district court's factual finding that variations among respondents were "small." App. 99a.

Tyson advocates (at 42) a standard of hyper-precision that would require classwide evidence to capture every minuscule variation in workers' time. *Mt. Clemens* rejects such a standard. Workers are not robots. Small differences among workers in performing tasks are inevitable no matter how similarly situated they are. Even a single worker can vary in his daily routines. *See, e.g.*, JA260, 265 (class member Lovan estimating range of 17-19 minutes for activities at issue). Tyson's argument (at 35) that common evidence cannot "mask differences" would bar even the inference that a worker who spent 18 minutes donning and doffing on Monday spent the same amount of time on Tuesday. Had Tyson kept lawful, accurate records, it could have tracked (and avoided damages for) such minor variations. Because Tyson did not, *Mt. Clemens* permitted respondents to proceed through reasonable classwide approximation.

b. Tyson argues (at 41) that *Mt. Clemens* applies only when the amount of time worked affects only

how much overtime workers are owed rather than whether they exceeded the 40-hour overtime threshold. But, where the "liability" question is simply whether an employee suffered any damages, that distinction is untenable: finding that damages are zero is the same as finding no liability. And limiting *Mt. Clemens* as Tyson requests is inconsistent with its central rationale: preventing employers that violate recordkeeping duties from reaping a windfall. It would be perverse to permit defendants to avoid liability altogether based on that statutory violation.

Distinguishing liability from damages is also unworkable in this context because it would provide incompatible standards of proof for a single fact in the same litigation: amount of work. That fact is the same whether supporting "liability" or "damages." Limiting representative proof to one use and not the other "makes no sense, and can readily lead to bizarre results," including convoluted jury instructions under which the same fact would have to be proven under different standards for different purposes. *Halliburton II*, 134 S. Ct. at 2414-15 (rejecting argument that defendants may introduce price-impact evidence to counter market efficiency but not to rebut presumption of reliance).

Because the distinction is untenable, it is unsurprising that appellate courts explicitly permit inferential proof to show both whether and how much overtime is owed. *See, e.g.*, *Garcia*, 770 F.3d at 1307 ("[T]he jury could reasonably rely on representative evidence to determine class-wide liability because Tyson failed to record the time actually spent by its employees on pre- and post-shift activities."); *accord Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997); *Martin v. Selker Bros., Inc.*, 949

F.2d 1286, 1298 (3d Cir. 1991); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589-90 (9th Cir. 1988); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985), *abrogated on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).

Moreover, because the distinction between "no liability" and "no damages" is empty, defendants can readily turn damages issues into liability issues. Under the FLSA, for instance, employers could claim the "de minimis" exception and thereby avoid burden-shifting because that question goes to liability rather than damages. *See Mt. Clemens*, 328 U.S. at 692.

Tyson misreads (at 41) *Mt. Clemens*' statement that its rule applies when "damage is certain" and the "uncertainty lies only in the amount of damages." 328 U.S. at 688. As the Court explained, the right to proceed through inferential proof is triggered when the employer categorically fails to pay employees for compensable activities—when "the employee has proved that he has performed work and has not been paid in accordance with the statute," *id.*, or "that he has in fact performed work for which he was improperly compensated," *id.* at 687-88. Here, all respondents satisfied that prerequisite by proving they were "improperly compensated" for work—walking and donning/doffing certain gear. Respondents were never compensated for donning and doffing sanitation gear and standard PPE. From 2004-2007, no class member was compensated for time walking to and from the locker room—time the jury found part of the continuous

workday (and therefore compensable). *See Alvarez*, 546 U.S. at 37. Tyson thus systematically failed to pay class members for compensable work, and *Mt. Clemens* authorized respondents to calculate their overtime damages based on classwide, representative proof.

4. Tyson's opportunity to rebut respondents' classwide proof did not defeat predominance

Under *Mt. Clemens*, respondents' inferential proof shifted the burden to Tyson "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-88.

But, even if Tyson had tried to rebut the *Mt. Clemens* presumption with evidence specific to individual class members (which it did not), "there [would have been] no reason to think that these questions [would] overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2412. In *Halliburton II*, this Court recognized that, although the rebuttable nature of the fraud-on-the-market presumption "has the effect of leaving individualized questions . . in the case," individualized rebuttals do not defeat certification unless they are so widespread as to "overwhelm" the other common questions in the case. *Id.* (internal quotations and alteration omitted). The possibility "the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.*

Here, as in *Halliburton II*, there was "no reason to think" rebuttal evidence would "overwhelm" common questions. A defendant in Tyson's position often has no interest in mounting individualized rebuttals to a time study employing arithmetical averages because such a strategy would not reduce its aggregate damages, but merely reallocate them differently across the class by showing that some class members worked less than the average while others worked more.

Tyson's own litigation conduct illustrates that point. Beyond cross-examining respondents' representative witnesses, Tyson made no effort to adduce employee-specific rebuttal proof. At every turn, Tyson decided to forgo individualized rebuttal. It did not call individual class members to elicit testimony about time spent on compensable activities. When respondents offered to bifurcate liability and damages, Tyson opposed it as a "waste of resources." JA111-15. And Tyson affirmatively requested that the jury provide a lump-sum damages award rather than individual awards. JA8, 102-04, 464.

Tyson claims it could not take discovery on individualized issues once the court certified the class, but courts routinely permit discovery of absent class members. "'[T]he overwhelming majority of courts which have considered the scope of discovery against [absent class members] have concluded that such discovery is available.'" *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1332-33 (11th Cir. 2013) (Pro, J., dissenting in part and concurring in part) (quoting *Dellums v. Powell*, 566 F.2d 167, 187 (D.C.

Cir. 1977)).[4] In fact, Tyson deposed 22 class members and designated testimony from six for trial use; Tyson's strategic choice not to use that testimony does not prove it lacked the opportunity to do so. *Cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (distinguishing "right to pursue" a claim and economic incentive to do so).

Tyson was not deprived of any "right to raise individualized defenses." Pet. Br. 38. It made a strategic decision not to expend resources on individualized rebuttals to Dr. Mericle's time calculations and chose to respond with evidence common to the class, validating the district court's determination that common questions would predominate. Now that its all-or-nothing strategy has failed, Tyson cannot get a do-over by objecting to certification based on individualized defenses it declined to pursue. Permitting Tyson to defeat certification now on that basis would eviscerate *Mt. Clemens*' core purpose of preventing defendants from benefiting by their own misconduct. Given Tyson's strategic choice to forgo individualized rebuttals, the district court did not abuse its discretion in concluding that individualized issues would not overwhelm the common questions respondents' case presented.

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[4] The Newberg treatise cited by Tyson (at 37-38) cites three district court cases—hardly demonstrating a "general" rule against class discovery on individualized issues. As the district court did here, other district courts have permitted discovery on individual issues in class litigation. *See, e.g., In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 2014 WL 5392465, at *2 (S.D.N.Y. 2014); *Laborers Local 17 Health & Ben. Fund v. Philip Morris, Inc.*, 1998 WL 241279, at *3 (S.D.N.Y. 1998).

D. The FLSA Collective Action Was Properly Certified

The collective action's certification was proper under FLSA § 216(b). Because Tyson concedes the collective-action standard is *no more stringent* than Rule 23, the Court should affirm the collective-action certification for the same reasons class certification was proper under Rule 23.

Apart from a single lower-court decision suggesting that the FLSA and Rule 23 standards are functionally equivalent, Pet. Br. 26, Tyson offers no sustained argument that the FLSA's separate "similarly situated" requirement is not met. To the extent the Court addresses the scope of § 216(b), it should reject Tyson's interpretation as inconsistent with the statute's plain language, which does not incorporate Rule 23's requirements. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) ("To now interpret this 'similarly situated' standard by simply incorporating the requirements of Rule 23 would effectively ignore Congress' directive."). Most appellate courts have concluded correctly that § 216(b) does not require predominance of common questions. *See, e.g., O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585-86 (6th Cir. 2009); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) ("[t]he 'similarly situated' requirement . . 'is considerably less stringent than the requirement of Rule 23(b)(3) that common questions "predominate"'") (citation and alteration omitted). Tyson's sole challenge to the FLSA collective-action certification thus lacks merit.

E. Tyson's Rules Enabling Act And Due Process Challenges Fail

The Rules Enabling Act provides that Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Rules Enabling Act does not apply to the collective action, which is created by statute, not rule. And the class action did not alter substantive rights. It did not "lessen" respondents' burden of proof. Pet. Br. 37. The district court properly applied the *Mt. Clemens* standard, a *substantive* standard of proof triggered by Tyson's violation of recordkeeping requirements. Based on two lower-court cases—including a district court decision still on appeal—Tyson argues (at 36) that "[n]o court" would have allowed an individual employee to prove his own compensable time based on evidence submitted by other employees. Those cases do not establish any such rule; nor could they, as such a rule would contradict *Mt. Clemens*.[5]

Nor was Tyson deprived of its right to defend itself. Tyson argued the insufficiency of respondents' classwide proof by presenting evidence of actual time worked and contesting the reasonableness of respondents' inferential proof. *See Mt. Clemens*, 328 U.S. at 687-88. Tyson cross-examined Drs. Mericle and Fox, but decided for strategic reasons not to

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[5] Those cases are inapposite. *See Callahan v. City of Chicago*, 78 F. Supp. 3d 791, 823 (N.D. Ill. 2015) (finding that plaintiff had only "meager evidence" of minimum-wage violation), *appeal pending*, No. 15-1318 (7th Cir.); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88-89 (2d Cir. 2003) (workers on different building projects at different sites performing different jobs at different times for different pay).

present its own expert or to assert employee-specific defenses. *See supra* pp. 18-19.

Tyson repeatedly invokes *Wal-Mart*'s "trial by formula" mantra, but *Wal-Mart* addressed a starkly different problem. *Wal-Mart* disapproved extrapolation in a massive sex-discrimination class action in which plaintiffs sought to prove for all class members the subjective question underlying each plaintiff's claim—"why was I disfavored?," 131 S. Ct. at 2552—through a sample of class members. *Id.* at 2561. Nothing resembling that occurred here. In contrast to the myriad discretionary decisions in *Wal-Mart*, respondents were subjected to a common, plant-wide policy that systematically undercompensated them for compensable work under the FLSA and state law. Given Tyson's failure to keep accurate time records, *Mt. Clemens* permitted respondents to prove their hours based on an objective reasonable-approximation standard capable of classwide proof. Nothing in *Wal-Mart* overrides *Mt. Clemens*. Reading *Wal-Mart* to forbid the use of inferential proof under *Mt. Clemens*, a case interpreting the FLSA, in a class proceeding would violate *respondents*' rights under the Rules Enabling Act.

II. THAT SOME CLASS MEMBERS CANNOT PROVE DAMAGES DOES NOT DEFEAT CERTIFICATION OF A CLASS OR COLLECTIVE ACTION

The second question presented is "[w]hether a class action may be certified or maintained" when it contains uninjured members. Pet. Br. i. Tyson now correctly concedes the answer is yes: Article III, it acknowledges, "does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." Pet. Br. 49. This Court's decisions compel the conclusion that neither Article III nor Rule 23 forbids certification of a class including members ultimately found to lack compensable damages.

Tyson now argues only that a court may not "*award damages* to class members who cannot prove injury." *Id.* at 46 (emphasis added). That argument falls outside the question presented, and the judgment fully satisfies Tyson's criteria anyway. Class members without compensable damages did not "contribute to the size of [the] damage award" and "cannot recover . . damages" under it. *Id.* at 49.

A. Neither Article III Nor Rule 23 Precludes Certifying A Class With Some Members Who Ultimately Do Not Prove Injury

1. This Court repeatedly has held that a "case or controversy" exists under Article III whenever one plaintiff has standing. *See, e.g., Horne v. Flores*, 557 U.S. 433, 446-47 (2009); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). That principle applies to class litigation, which, "like traditional joinder, leaves the parties' legal rights

and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality).

Although the Court has announced this principle most clearly in cases involving injunctive relief, it applies irrespective of the relief sought: If a single class member's injury suffices (as Tyson acknowledges, at 46) to create a justiciable controversy over her entitlement to redress, the controversy exists regardless of whether the *form* of redress is compensatory (damages) or preventive (injunctive relief). Standing principles apply to actions aimed at either "obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000). If a single "plaintiff demonstrate[s] standing . . for each *form* of relief sought," the court has jurisdiction to resolve the plaintiff's claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added; internal quotations omitted); *see generally* 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.15 (3d ed. 2008). Accordingly, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) (Posner, J.); *accord In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306-07 (3d Cir. 1998); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010).

The presence of class members with no compensable damages poses no Article III problem.

The claims of hundreds of injured members undisputedly presented a justiciable case. Unlike the *merits* question of plaintiffs' ultimate proof of damages, standing addresses the power of federal courts to adjudicate a case or controversy—"whether on the case before a court .. the law confers the power to render a judgment or decree." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838). Because the purpose of the court's jurisdiction is to declare winners and losers, "[t]here may be jurisdiction and yet an absence of merits." *Gen. Inv. Co. v. New York Cent. R.R. Co.*, 271 U.S. 228, 230 (1926). Jurisdiction "is not defeated" by a plaintiff's inability to demonstrate he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). *See generally Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Doe v. Chao*, 540 U.S. 614, 624-26 (2004).

If the Court held otherwise, every damages plaintiff—in individual and class-action cases—would have to prove her case to avoid a jurisdictional dismissal under Rule 12(b)(1). Moreover, if a plaintiff who did not show damages at trial lacked standing, the proper resolution would not be judgment in the defendant's favor but a jurisdictional dismissal without res judicata effect. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Such a novel rule, beneficial to neither plaintiffs nor defendants and wasteful of judicial resources, would contradict this Court's longstanding recognition that failure to prove entitlement to relief requires a merits judgment, not a jurisdictional dismissal. *See Gen. Inv. Co.*, 271 U.S. at 230-31; *Bell*, 327 U.S. at 682; *see also Kohen*, 571 F.3d at 677 (Posner, J.) ("[W]hen a plaintiff loses a [damages] case [at trial] because he

cannot prove injury the suit is not dismissed for lack of jurisdiction.").

2. Likewise, neither Rule 23 nor the FLSA requires a showing that all class or collective-action members have compensable damages. Such a requirement would "put the cart before the horse" by conditioning certification on plaintiffs' "first establish[ing] that [they] will win the fray." *Amgen*, 133 S. Ct. at 1191. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* at 1191 (internal quotations and alteration omitted). Accordingly, "[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *see also, e.g.*, *Nexium*, 777 F.3d at 21-22; *Kohen*, 571 F.3d at 677.

Conditioning certification on proof all class members were injured would create practical conundrums at odds with Rule 23's structure and purpose. Rule 23(c)(1)(A) requires certification at an "early practicable time," but assessing class members' injuries at certification is often infeasible because their identities are unknown. *See, e.g.*, *Nexium*, 777 F.3d at 21-22; *Kohen*, 571 F.3d at 677. Avoiding that difficulty by building injury into the class definition would run up against many courts' disapproval of "fail-safe" class definitions. *E.g.*, *Nexium*, 777 F.3d at 22. Moreover, because class

certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals would be thwarted by requiring decertification—rather than adverse merits decisions to class members without damages—if *any* plaintiffs were shown to be uninjured at any stage, even (as here) after trial. Years of the court's and parties' time would be wasted if just one such plaintiff were discovered. Equally troubling, because classes must be certifiable to be settled, *see Amchem*, 521 U.S. at 620, neither defendants nor plaintiffs could rely on across-the-board resolutions without identifying every class member and demonstrating that all were injured.

Limiting Rule 23 certification to classes where all members were injured would also undermine well-established rules governing other substantive causes of action. For example, in Title VII cases using pattern-or-practice proof—generally available *only* in class actions or government enforcement actions, *see Chin v. Port Auth.*, 685 F.3d 135, 148-50 (2d Cir. 2012)—a court first adjudicates whether a discriminatory practice exists and then holds individualized hearings on each class member's injury and entitlement to a remedy. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977). Limiting classes to plaintiffs who show injury would contradict *Franks*' holding that such a showing is not necessary to class certification, but "become[s] material" only at the remedial stage. 424 U.S. at 772. As *Teamsters* recognized, "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief

was a victim of the employer's discriminatory policy." 431 U.S. at 360.

Holding that an FLSA collective action could proceed only if all members were injured would likewise conflict with Congress's choice of this procedural mechanism to redress violations of federal law. Opting in to a collective action is analogous to joining an ongoing action as an individual plaintiff. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259 n.35 (11th Cir. 2008). It would be anomalous for a collection of plaintiffs with valid claims to have their entire action dismissed because of the joinder of an additional plaintiff whose damages claim was unsuccessful. Such a result would also encourage gamesmanship: Employers could solicit uninjured workers to opt in as "poison-pill" plaintiffs to undo certification.

Finally, the tedious work of constantly weeding out uninjured members and the wasteful step of decertifying classes years after the fact if any members without damages are revealed is unnecessary to prevent uninjured class members from recovering. If uninjured members come to light, several procedural solutions are available: (1) narrowing the class; (2) summary judgment as to the uninjured members; or (3) instructing the jury not to base any award of damages on uninjured individuals. Tyson waived the first two options, *see* Dkt. 212-1, and the court employed the third, JA481.

3. Tyson no longer disputes these points, acknowledging (at 49) that a class or collective action *may* include uninjured members. Having posited a circuit conflict in its petition and represented it

would advocate a negative answer to the question, Tyson has pulled the same bait-and-switch this Court saw in *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). There, as here, the petitioner "persuaded [the Court] to grant certiorari" and then "chose to rely on a different argument," *id.* at 1772, disavowing the position in its petition in favor of a fact-bound argument that assumed the opposite answer to the question from the one pressed in the petition. *See id.* Here, this Court should hold that a court may certify a class or collective action with members who lack compensable damages. Alternatively, as in *Sheehan*, this Court may choose to dismiss the writ as improvidently granted on the second question.

B. Tyson's Argument That The Courts Below Approved An Award Of Damages To Uninjured Persons Lacks Merit

Instead of addressing its second question, Tyson pivots to arguing that a court may not award damages to uninjured plaintiffs. Although Tyson presents the issue as one of Article III justiciability, it is no more than an uncontested truism about *substantive* law: A court may not award damages to a plaintiff who has none, class action or no. In arguing that the judgment did so, Tyson transforms the petition's challenge to the *certification* decision into a fact-bound claim that *the jury verdict* increased Tyson's liability because of, or awarded damages to, uninjured individuals. Tyson's argument is outside the question presented and rests on claims of error that Tyson invited below and lacks standing to assert. Should the Court choose to reach it, Tyson's new argument lacks merit because the

verdict did not award damages for uninjured plaintiffs.

1. Tyson's arguments rest largely on the verdict's award of an unallocated sum to the class. But Tyson lacks standing to complain about a potential allocation of the verdict that does not change its liability. *See, e.g.*, *Waisome v. Port Auth.*, 999 F.2d 711, 714-15 (2d Cir. 1993); *see generally Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670 (7th Cir. 2015) (collecting cases rejecting challenges to intra-class damages allocations that did not change defendants' liability). "[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth*, 422 U.S. at 499).

Accepting Tyson's objections to the unallocated verdict would be especially inappropriate because Tyson invited that supposed error on multiple occasions. Tyson proposed a classwide verdict and opposed a bifurcated proceeding yielding individualized awards. JA8, 102-04, 111-15. And Tyson knew about the non-damaged individuals when it moved to decertify, but made no effort to exclude them from the class, opting for an all-or-nothing decertification demand. *See* Dkt. 212-1. Tyson received the verdict form it preferred—a single sum for the class—and cannot now complain it got what it requested.

2. In any event, the judgment does not award damages to, or on account of, uninjured people. The jury considered individualized breakdowns of the damages to which each class member was entitled, which specified those class members without

damages. *See supra* pp. 18-19. The court explicitly instructed the jury not to "award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid," JA471-72, and that "[a]ny employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages," JA481.

Juries are presumed to follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Moreover, one challenging a verdict must show that no reasonable person could have reached it. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). To the extent a jury verdict is unclear, courts adopt the interpretation consistent with the jury instructions, *see Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 311 (7th Cir. 2009), reconciling inconsistencies "if at all possible," *Bauer v. Norris*, 713 F.2d 408, 413 n.8 (8th Cir. 1983) (internal quotations omitted), and resolving ambiguities "in favor of the jury's verdict," *Phenix Fed. Sav. & Loan Ass'n, F.A. v. Shearson Loeb Rhoades, Inc.*, 856 F.2d 1125, 1129 (8th Cir. 1988).

Tyson cannot overcome these presumptions. It offers no reason to believe the jury violated its instructions by awarding damages attributable to uninjured individuals, much less that no reasonable person could have reached the verdict.

Tyson's sole basis for assuming uninjured members will share in the unallocated award is the conjecture of one judge who dissented below. Pet. Br. 52. Nothing in the record supports that assertion, as the district court has not yet exercised its authority

to approve allocation of the verdict—a procedure used when a verdict does not specify how it is to be distributed. *See, e.g.*, *In re Urethane Antitrust Litig.*, 2013 WL 3879264, at *2-3 (D. Kan. 2013), *aff'd*, 768 F.3d 1245 (10th Cir. 2014), *pet. for cert. pending*, No. 14-1091 (filed Mar. 10, 2015); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 2011 WL 1808038, at *2 (D. Kan. 2011); *In re Exxon Valdez*, 1996 WL 384623, at *19 (D. Alaska 1996). Tyson has no basis for speculating that the court would allocate any part of the award to uninjured individuals.

Tyson suggests (at 53) that an allocation would raise due process or Seventh Amendment concerns by "reopen[ing] the judgment and reallocat[ing] the damages," but it offers no authority remotely on point. Approving an allocation would neither reopen the *judgment*, as Tyson's liability would remain unchanged, nor *re*allocate anything, as allocation of the verdict consistent with the jury instructions remains the district court's proper role.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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